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Congress of the United States
House of Representatives
Washington, DC 20515-1306

July 23, 2001

The Honorable Don Young
Chairman
Transportation and Infrastructure Committee
2165 RHOB
Washington, D.C. 20515

Dear Don:

We are writing to you about the grave concerns we have with H. R. 2107, The End Gridlock at Our Nation's Critical Airports Act of 2001.

We believe attempts by Congress to strip the authority of Governor Ryan and the Illinois Legislature over the delegation and authorization to Chicago of state power to build airports — along with the authority of governors and state legislatures in a host of other states such as Massachusetts (Logan), New York (LaGuardia and JFK), New Jersey (Newark) California (San Francisco airport), and the State of Washington (Seattle) — raise serious constitutional questions.

Under the framework of federalism established by the federal constitution, Congress is without power to dictate to the states how the states delegate power — or limit the delegation of that power — to their political subdivisions. Unless and until Congress decides that the federal government should build airports, airports will continue to be built by states or their delegated agents (state political subdivisions or other agents of state power) as an exercise of state law and state power. Further compliance by the political subdivision of the oversight conditions imposed by the State legislature as a condition of delegating the state law authority to build airports is an essential element of that delegation of state power. If Congress strips away a key element of that state law delegation, it is highly unlikely that the political subdivision would continue to have the power to build airports under state law. The political subdivision's attempts to build runways would likely be ultra vires (without authority) under state law.

Under the Tenth Amendment and the framework of federalism built into the Constitution, Congress cannot command the States to affirmatively undertake an activity. Nor can Congress intrude upon or dictate to the states, the prerogatives of the states as to how to allocate and exercise state power — either directly by the state or by delegation of state authority to its political subdivisions.

As stated by the United States Supreme Court:

[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, *not States* ... We have always

understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, *it lacks the power directly to compel the States to require or prohibit those acts.*

New York v. United States, 505 U.S. 144, at 166 (1992) (emphasis added)

It is incontestable that the Constitution established a system of "*dual sovereignty*."

Printz v United States, 521 U. S. 898, 918 (1997) (emphasis added)

Although the States surrendered many of their powers to the new Federal Government, they retained "a residuary and inviolable sovereignty," The Federalist No. 39, at 245 (J. Madison). This is reflected throughout the Constitution's text.

Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, § 8, which implication was rendered express by the Tenth Amendment's assertion that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Id at 918-919

This separation of the two spheres is one of the Constitution's structural protections of liberty. "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.

Id at 921 quoting *Gregory v. Ashcroft*, 501 U.S. 452 at 458 (1991)

The Supreme Court in *Printz* went on to emphasize that this constitutional structural barrier to the Congress intruding on the State's sovereignty could not be avoided by claiming either a) that the congressional authority was pursuant to the Commerce Power and the "necessary and proper clause of the Constitution or b) that the federal law "preempted" state law under the Supremacy Clause. 521 U. S. at 923-924.

It is important to note that Congress can regulate — but not affirmatively command — the states when the state decides to engage in interstate commerce. See *Reno v. Condon*, 528 U. S. 141 (2000). Thus in *Reno*, the Court upheld an act of Congress that restricted the ability of the state to distribute personal drivers' license information. But *Reno* did not involve an affirmative

command of Congress to a state to affirmatively undertake an activity desired by Congress. Nor did *Reno* involve (as proposed here) an intrusion by the federal government into the delegation of state power by a state legislature — and the state legislature's express limits on that delegation of state power — to a state political subdivision.

H.R. 2107 would involve a federal law which would prohibit a state from restricting or limiting the delegated exercise of state power by a state's political subdivision. In this case, the proposed federal law would seek to bar the Illinois Legislature from deciding the allocation of the state's power to build an airport or runways — and especially the limits and conditions imposed by the State of Illinois on the delegation of that power to Chicago. The law is clear that Congress has no power to intrude upon or interfere with a state's decision as to how to allocate state power.

A state's authority to create, modify, or even eliminate the structure and powers of the state's political subdivisions — whether that subdivision be Chicago, Bensenville, or Elmhurst — is a matter left by our system of federalism and our federal Constitution to the exclusive authority of the states. As stated by the Seventh Circuit in *Commissioners of Highways v. United States*, 653 F.2d 292 (7th Cir. 1981) (quoting *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907)):

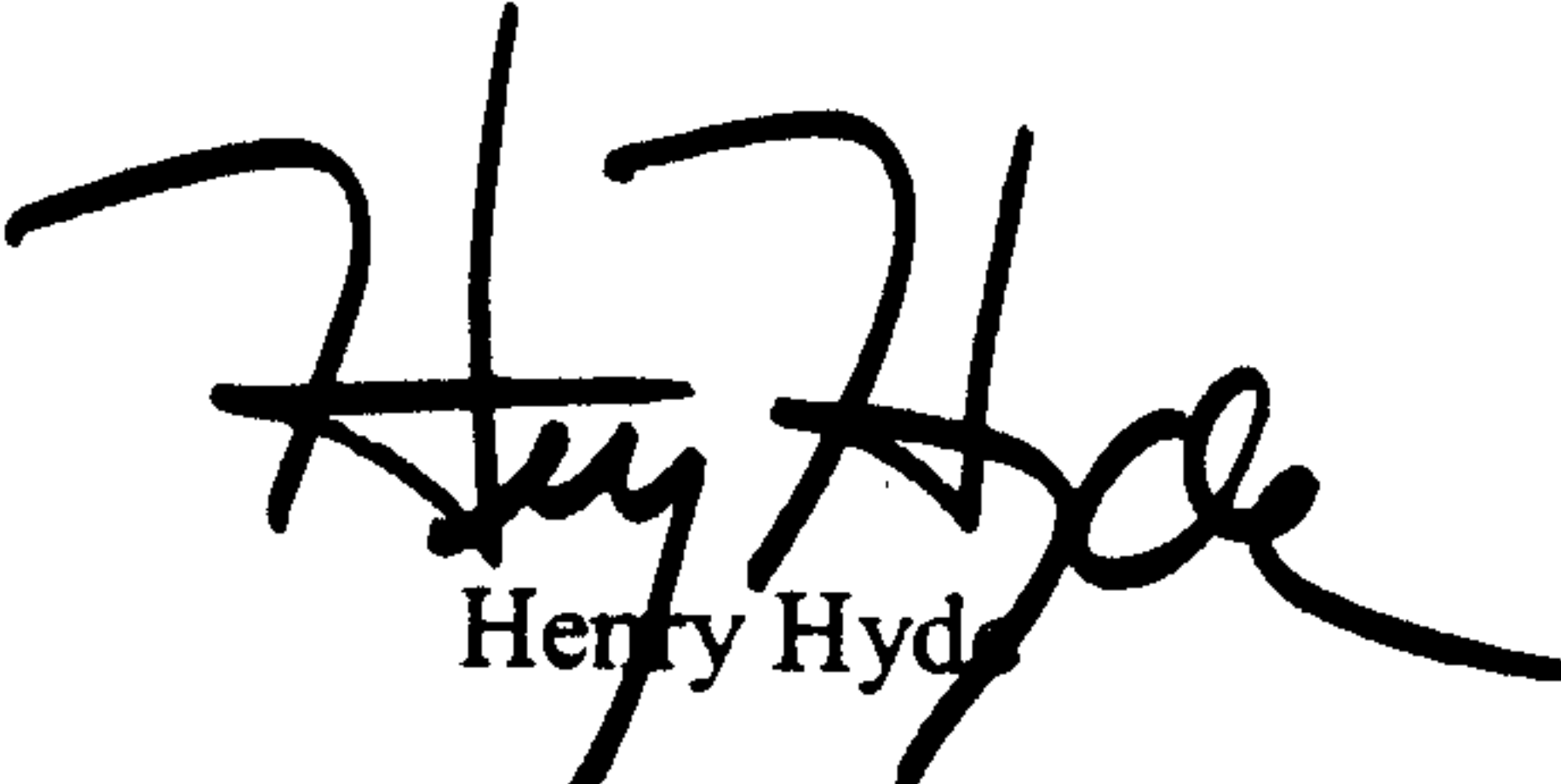
Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State.... The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.

Commissioners of Highways, 653 F.2d at 297
(emphasis added).


Chicago has acknowledged that Illinois has delegated its power to build and operate airports to its political subdivisions by express statutory delegation. 65 ILCS 5/11-102-1, 11-102-2 and 11-102-5. These state law delegations of the power to build airports and runways are subject to the Illinois Aeronautics Act requirements — including the requirement that the State approve any alterations of the airport — by their express terms. Any attempt by Congress to remove a condition or limitation imposed by the Illinois Legislature on the terms of that state law delegation of authority would likely destroy the delegation of state authority to build airports by

the Illinois Legislature to Chicago — leaving Chicago without delegated state legislative authority to build runways and terminals at O'Hare or Midway. The requirement that Chicago receive a state permit is an express condition of the grant of state authority and an attempt by Congress to remove that condition or limitation would mean that there was no continuing valid state delegation of authority to Chicago to build airports. Chicago's attempts to build new runways would be ultra vires under state law as being without the required state legislative authority.

Very truly yours,



Henry Hyde



Jerry Weller



Phil Crane